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Supreme Court, U.S.
FILED
FEB 5 2003
OFFICE OF THE CLERK

No. 02-905

IN THE

Supreme Court of the United States

GENERAL COMMITTEES OF ADJUSTMENT GO-386 and GO-245 OF THE UNITED TRANSPORTATION UNION,

and

UNITED TRANSPORTATION UNION,

Petitioners,

v.

THE BURLINGTON NORTHERN and SANTA FE RAILWAY COMPANY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

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February 5, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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PETITIONER'S REPLY BRIEF

Respondents, The Burlington Northern and Santa Fe Railway Company (BNSF), eleven (11) other railroads bargaining with the BNSF, and the Chairman of their bargaining group, the National Carriers' Conference Committee (NCCC), have filed a brief in opposition to this petition for a writ of certiorari. In their brief, respondents argue that this case does not raise an important issue of federal law that has not already been addressed by this Court, and that petitioners are wrong in asserting that there is a conflict among the circuits. Both arguments are without merit.

I. RESPONDENTS' ARGUMENT THAT THERE IS NOTHING CONTROVERSIAL ABOUT THE D.C. CIRCUIT'S RULING THAT A COURT MAY COMPEL MULTI-EMPLOYER BARGAINING IGNORES THE FACT THAT TWO OTHER CIRCUITS HAVE REJECTED THAT READING OF THE RLA. IT ALSO IGNORES THE FACT THAT, UNDER THE RLA'S SISTER LEGISLATION, THE NLRA, IT HAS LONG BEEN RECOGNIZED THAT MULTI-EMPLOYER BARGAINING IS CONSENSUAL FOR *BOTH* EMPLOYERS AND UNIONS.

Respondents contend that this case does not present important issues of federal law that have not already been settled by this Court, because, they assert, all that is involved here is the non-controversial application of the command in Section 2 First of the Railway Labor Act (RLA), 45 U.S.C. § 152 First, that the parties have a duty "to exert every reasonable effort to make and maintain agreements . . . ." This Court, their argument continues, has held that this duty is "enforceable by whatever appropriate means might be developed on a case-by-case basis" (*Chicago & North*

Western Ry. v. UTU, 402 U.S. 570, 577 (1971)) and the lower courts "have developed a substantial jurisprudence concerning the meaning of 'every reasonable effort' in the context of particular circumstances." Brief in Opp. at 6. They then conclude by asserting that "[t]here is nothing controversial about the lower court's approach or its conclusion that, under certain circumstances where history may point the way, the parties *may be required* to engage in national handling as part of their duty to make 'every reasonable effort' to resolve disputes and reach agreement." Brief in Opp. at 9 (emphasis added). That statement, petitioners submit, is patently erroneous, for what the D.C. Circuit has held in this case—*i.e.*, that multi-employer bargaining is *not* entirely consensual and may be compelled—is clearly controversial. It is a result that no other court has reached and two circuits have rejected. It is also contrary to the balance of similar competing interests that was struck by the National Labor Relations Board (NLRB) under the National Labor Relations Act (NLRA), 29 U.S.C. § 151, *et seq.*—and upheld by this Court—which recognizes the "voluntary nature of multiemployer bargaining." *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, 412 (1982).

When this case was before the D.C. Circuit, respondents solicited and obtained the participation of the National Mediation Board (NMB) as an *amicus curiae* before the Court of Appeals. In its brief, the NMB asserted that the decision of the district court in this case, which was consistent with the Sixth and Eighth Circuits decisions, "could have a substantial and adverse affect . . . on labor peace among those industries governed by the [Railway Labor] Act." Brief for United States as *Amicus Curiae* in D.C. Cir. Nos. 01-7068 & 01-7069, at 2. Now, having prevailed before that Circuit Court of Appeals, respondents no longer see the importance of the issues presented by this case, because, they contend, the D.C. Circuit's decision in this case involves nothing more

than "just another application of the approved case-by-case approach to Section 2 First" of the RLA. Brief in Opp. at 9. That contention, however, ignores the extraordinary nature of the result reached by the D.C. Circuit: In no other Circuit may a rail union or a railroad be compelled to participate in multi-employer bargaining. Moreover, in *no* Circuit, including in the D.C. Circuit, may a union or an employer subject to the NLRA be compelled to participate in multi-employer bargaining.

This latter point, petitioners submit, is especially significant here, for while the *scope* of the duty to bargain under the Railway Labor Act is *broader* than the comparable duty under the NLRA (*Pittsburgh & Lake Erie R.R. v. RLEA*, 491 U.S. 490, 508, n. 17 (1989) ("[E]nlarged scope of mandatory bargaining under the RLA")), both Acts are similar in that they do not provide for governmental regulation of the terms and conditions of employment.[1/] It is partly for this reason—*i.e.*, to protect the freedom to contract—that the courts in enforcing Section 2 First must use "great circumspection" in going beyond cases involving the "desire not to reach agreement." *Chicago & North Western Ry.*, 402 U.S. at 579, n.11.[2/] Thus, whether the D.C. Circuit

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[1/] *Compare, Terminal Railroad Association v. Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6 (1943) ("The Railway Labor Act . . . does not undertake governmental regulation of wages, hours, or working conditions as such"), *with*, *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970) ("The object of this Act [NLRA] was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions").

[2/] Respondents assert that "the lower courts have developed a substantial jurisprudence concerning the meaning of 'every reasonable effort' in the context of particular circumstances" (Brief in Opp. at 6) and they cite to various cases, the latest of which is *AFA v. Horizon Air Industries, Inc.*, 976 F.2d 541 (9th Cir. 1992). That case supports petitioners, for the Ninth Circuit emphasized the limited role of the federal

was correct in substituting an objective "reasonable effort" test for the subjective "good faith bargaining" test employed under the RLA since *Chicago & North Western Ry.*, is clearly an important issue that merits review by this Court.

Similarly, the need to protect freedom of contract is also an integral aspect of the reasoning that the NLRB employed when, in "balancing the conflicting legitimate interests" raised by multi-employer bargaining (*NLRB v. Truck Drivers Local 449*, 353 U.S. 87, 96 (1957)), it concluded that multi-employer bargaining was voluntary. *Brown v. Pro Football, Inc.*, 518 U.S. 231, 244 (1996) ("[C]onsent is automatically present whenever multiemployer bargaining takes place"); *Charles D. Bonanno Line Service, Inc. v. NLRB*, 454 U.S. at 413. Thus, for a court to rule that multi-employer bargaining may be *obligatory*, at the very least involves far more than "just another application of the approved case-by-case approach to Section 2 First." Brief in Opp. at 9. It surely justifies review by this Court to determine whether there should be, as respondents argue, such a significant difference between the two Acts.

Respondents attempt to sweep aside the controversial nature of the D.C. Circuit's decision by asserting that compelling a party to participate in multi-employer bargaining fits nicely into the jurisprudence developed under Section 2 First because in this case, "before negotiations even begin, Petitioners have ruled out any possibility of a national agreement." Brief in Opp. at 9. However, rather than showing that this case does not present unresolved, important issues of federal law, respondents' arguments once again highlight the importance of the issues raised by this petition.

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courts in enforcing § 2 First. 976 F.2d at 544-58, *quoting Regional Airline Pilots, Association v. Wings West Airlines, Inc.*, 915 F.2d 1399, 1402 (9th Cir. 1990) ("'the federal courts' obligation is to oversee the broad structure of the process and prevent major deviations, not to be involved in particulars of the bargaining process").

In this case, the district court concluded that respondents had not raised a genuine dispute of fact over whether the three Committees were acting with a desire *not* to reach an agreement in declining to participate in national handling. Pet. App. at 21a. As the district court explained (*Id.*):

> [T]he three General Committees are not driven by a desire to thwart the bargaining process. Rather, the Committees have legitimate reasons for wanting to bargain locally and to reach individual agreements. The three General Committees have legitimate local issues that they feel will be ignored at the national bargaining table.

Since the Committees were not acting with a "desire not to reach an agreement" in declining to participate in national handling, the district court concluded that the Committees had not violated Section 2 First. As the Ninth Circuit's decision in *Horizon Air* shows, that reading of Section 2 First is consistent with the substantial jurisprudence concerning Section 2 First that has been developed since *Chicago & North Western*. However, according to the D.C. Circuit, it is not the *proper* interpretation of Section 2 First, because the trial court should substitute its own conclusion of what is "reasonable" for the determination by a party as to the form of agreement that is in its own best interests. This, however, is where the conflict lies between the D.C. Circuit's approach to national handling and the approach taken by the Eighth and Sixth Circuits.

By centering on solely whether multi-employer bargaining may be a "reasonable effort" under Section 2 First, the D.C. Circuit ignores the other competing interests that are implicated by this question, such as the impact that engaging in national handling will have on the Committees' right to accept or reject the outcome of the bargaining. The three Committees may legitimately desire to resolve "local" issues, but being required to bargain nationally will preclude them

from insisting that those local issues be resolved before the group enters into a national agreement. This is so because the object of multi-employer bargaining, as respondents acknowledge, is a "national agreement"—*i.e.*, one agreement that applies to all—and this in turn means that a party to such bargaining may not bargain to impasse over issues that pertain only to it.[3/] Thus, under the D.C. Circuit's approach, a federal court, by compelling a party to bargain nationally, may limit the party's ability to obtain through that bargaining contract terms that are important to it.

On the other hand, under the approach taken by the Eighth and Sixth Circuits, which looks to the right given by Section 2 Third of the RLA to designate bargaining agents, the courts give meaning to the party's freedom of contract, because they allow the bargaining agent designated by the interested party to decide whether to accept or to reject proposed contract terms. According to the Eighth Circuit, nothing in Section 2 First requires the party opposing multi-employer bargaining to cede its bargaining authority to the group. *ARASA v. Soo Line R.R.*, 891 F.2d 675, 678 (8th Cir. 1989), *cert. denied*, 498 U.S. 809 (1990) ("[n]o . . . statutory provision obligates the railroad to designate a national, multi-carrier representative to conduct its negotiations"); *see also, UTU v. Grand Trunk Western R.R.*, 901 F.2d 489, 490 (6th Cir.), *cert. denied*, 498 U.S. 815 (1990). This result is entirely consistent with the principles developed under the NLRA for multi-employer bargaining. *Brown v. Pro Football, Inc.*, 518 U.S. at 244-45.

[3/] Respondents attempt to discount this limitation by arguing that the parties may bargain about local issues in national bargaining. Brief in Opp. at 8-9. That is correct, but it only highlights the problem, for even though local issues may be discussed, the party interested in those issues may not bring them to "closure"—*i.e.*, bargain them to impasse. *Delaware & Hudson Ry. v. UTU*, 450 F.2d 603, 611 (D.C. Cir.), *cert. denied*, 403 U.S. 911 (1971).

In short, whether the D.C. Circuit's approach to multi-employer bargaining, or the reasoning of the Eighth and Sixth Circuits, is correct, presents an important issue of federal law that this Court has not resolved under the RLA.

II. RESPONDENTS' ARGUMENT THAT THERE IS NO CIRCUIT CONFLICT OVER THE RELATIONSHIP BETWEEN SECTIONS 2 FIRST AND 2 THIRD, IGNORES THE FACT THAT BY INSISTING THAT THE UTU BARGAIN ON BEHALF OF THE COMMITTEES, RESPONDENTS ARE TRYING TO SELECT THE BARGAINING AGENT FOR THE COMMITTEES—WHICH VIOLATES SECTION 2 THIRD.

Respondents make two arguments as to why there is no conflict among the circuits, especially one that should be resolved by this Court. First, they argue that petitioners' contention that Section 2 Third of the RLA is applicable to this case, is a "red herring," for, according to respondents, "the employees represented by the UTU are free to select anyone they want as their representative—including subordinate committees of the UTU—but those representatives must discuss the railroads' proposals in national bargaining when it is practically appropriate as a reasonable effort to reach agreement." Brief in Opp. at 8. And second, respondents argue that there is no conflict between the D.C. Circuit's approach to national handling and the approach taken by the Eighth and Sixth Circuits, because, they contend, the Eighth and Sixth Circuit cases dealt with "compelling a party to *join* a bargaining coalition—not compelling a party to *negotiate with* such a group." Brief in Opp. at 10 (emphasis in original). Both arguments are without merit, for, as the Eighth Circuit observed in *ARASA v. Soo Line R.R.* about comparable arguments rail labor made in that case, the party seeking to compel multi-employer bargaining

acknowledges the right of the other party to designate its representatives, but then argues as if that right did not exist. 891 F.2d at 678 ("The railroad may bargain solely on its own behalf. The unions appear to concede this and yet continue to argue as if it is not so").

In this case, respondents claim that they are not interfering with the right of the employees to select their own bargaining representative because, they assert, all that they are insisting upon is that the negotiators whom the UTU sends to the bargaining table have the authority "to reach *any* kind of agreement—local, national, or a hybrid—that the parties may ultimately decide is in their mutual best interest." Brief in Opp. at 9 (emphasis in original). According to respondents, this demand does not implicate Section 2 Third. But, according to the Eighth Circuit, it does, for by insisting that the union's negotiators have the authority to reach a multi-employer agreement, respondents are touching upon the *authority* of the negotiators, which is an interest protected by Section 2 Third.

In other words, as has occurred here, by insisting that the negotiators have the authority to bargain for whatever agreement the railroads may propose as a group, respondents are claiming the right to select the union negotiator with whom they will bargain—which in this case, they assert, is the UTU's national negotiating committee for all issues common to the railroads bargaining as a group through the NCCC. This approach to Section 2 Third is consistent with the D.C. Circuit's decision, for that court adopted the reasoning of the district court in *Alton & Southern Ry. v. BMWE*, 928 F.Supp. 7, 16 (D.D.C. 1996), *appeal dismissed as moot*, D.C. Cir. No. 96-7140 (Feb. 10, 1997), that Section 2 Third "is intended to protect the identity of the representative, not the scope of his or her representation."

Petitioners, on the other hand, assert that the railroads, by insisting that the negotiator bargain on behalf of more

employees than the union is willing to include within the scope of the negotiator's authority, are interfering with the union's rights under Section 2 Third to select its bargaining agent. Looking to Section 2 Third to determine whether national handling obligatory is the approach taken by the Eighth and Sixth Circuits, but it conflicts directly with the reasoning of the D.C. Circuit that "Section 2 Third is not the governing [statutory] provision." Pet. App. at 5a. Thus, whether the D.C. Circuit's approach to this question is correct depends on whether the Eighth and Sixth Circuits were mistaken in holding that Section 2 Third protects a party from being required to share its bargaining authority with another and that Section 2 First does not trump that protection. *Soo Line R.R.*, 891 F.2d at 677-78 ("[W]e are aware of no decision [including *Brotherhood of Railroad Trainmen v. Atlantic Coast Line R.R.*, 383 F.2d 225 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968)] that construes this duty [imposed by § 2 First] to obligate the railroad to bargain for a national contract through a national representative. The unions' argument [that the Soo Line was required to bargain with the other railroads bargaining nationally for a national health and welfare agreement] ignores the statutory right of each party to designate a representative with whom the other party's representative must negotiate"). Thus, contrary to respondents' assertion, there is a conflict among the circuits.

Nor do respondents fare any better in their argument that there is not a circuit conflict because the Eighth and Sixth Circuit decisions dealt with the right of a railroad to refrain from joining a bargaining coalition, while the D.C. Circuit dealt with the entirely different question of the obligation of a union to bargain with railroads on which it represents employees. According to respondents, requiring a union, such as the UTU, which represents employees on several railroads to bargain with a coalition of those railroads does not impact the *employees'* Section 2 Third rights because the UTU

remains their duly designated representative. Brief in Opp. at 10-11. This argument, however, is without merit, for respondents read Section 2 Third too narrowly and fail to give effect to the Eighth Circuit's admonition in *Soo Line* that "the right to designate a representative applies equally to both sides of the negotiating table; each side is obligated to 'treat' with the other's designee." 891 F.2d at 679.

Section 2 Third deals with the selection of the actual negotiators, whereas it is Section 2 Fourth of the RLA which provides the "right" that respondents attempt to read into Section 2 Third—*i.e.*, the right of the "majority of any craft or class of employees . . . to determine who shall be the representative of the craft or class for the purposes of this Act." 45 U.S.C. § 152 Fourth. Just because employees of one railroad have selected a national union to represent their interests does not mean that they have authorized employees of another railroad to negotiate their contracts. They, through their designated representative, have to make that decision under Section 2 Third. The Eighth Circuit recognized that Section 2 Third protects the right of the employees to designate whomever they wish as their negotiator when it emphasized that Section 2 Third applied equally to both labor and management, and this approach to the symmetry of multi-employer bargaining is entirely consistent with the parallel development of that form of bargaining under the NLRA. *E.g.*, *Detroit Newspaper Publishers Association v. NLRB*, 372 F.2d 569 (6th Cir. 1967). But, more to the point, respondents' argument that there is no such symmetry under the RLA presents an issue that is worthy of review by this Court.

CONCLUSION

For the reasons set forth in the petition and herein, petitioners respectfully request that their petition be granted.

Respectfully submitted,

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